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No. 81-1891

In the Supreme Court of the United States

OCTOBER TERM, 1982

MORRISON-KNUDSEN CONSTRUCTION COMPANY, ET AL.,
PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

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In our brief in this case filed on June 16, 1982, we noted that the Director had moved the Benefits Review Board to reconsider its decision in *Minick* v. *Levin Metals Corp.*, No. 80-835 (Apr. 28, 1982), which announced that the Board would now include fringe benefits in the computation of LHWCA wages. This memorandum is filed to inform the Court that on July 29, 1982, the Board granted the motion for reconsideration and stated that the *Minick* case would be held in abeyance pending the Ninth Circuit's decision in the consolidated cases of *Duncanson-Harrelson Co.* v. *Director, OWCP*, No. 79-7093, and *Freer* v. *Duncanson-Harrelson Co.*, No. 79-7094.[1] We do not believe that this development, which does not indicate that

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[1] A copy of the Board's order is appended hereto.

the Board will return to its old position that fringe benefits are not to be included in the computation of LHWCA wages, in any way alleviates the uncertainty that warrants granting certiorari in this case.

Respectfully submitted.

REX E. LEE
Solicitor General

AUGUST 1982

APPENDIX

BENEFITS REVIEW BOARD

U.S. DEPARTMENT OF LABOR

No. 80-835

LOYD E. MINICK Claimant-Respondent	)	
v.	)	
LEVIN METALS CORPORATION	)	
and	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Employer/Carrier-Petitioners Cross-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent Cross-Petitioner	)	ORDER

In a motion dated May 4, 1982, the Director requested that the Board reconsider its Decision and Order of April 28, 1982, holding that employer contributions to fringe benefit funds must be included in a determination of an

injured employee's average weekly wage. Moreover, assuming that the Board grants this motion, the Director has requested that the Board defer its reconsideration until the United States Court of Appeals for the Ninth Circuit issues its decision in *Duncanson-Harrelson Company* v. *Director, OWCP,* Nos. 79-7093 and 79-7094 (9th Cir., filed March 8, 1979), *appealing Freer* v. *Duncanson-Harrelson Co.,* 9 BRBS 888 (1979), a case which raises the same issue.

After careful consideration of the issue raised, we have decided to grant the Director's motion. Accordingly, we grant the Motion for Reconsideration and will hold the instant case in abeyance pending the decision of the Ninth Circuit in *Freer.* At that time, we will reconsider our decision of April 28, 1982.

In a subsequent motion dated June 15, 1982, employer moved that the remand ordered in our decision of April 28, 1982, be stayed pending the disposition of *Hilyer* v. *Morrison-Knudsen Construction Co.,* 670 F. 2d 208, 14 BRBS 671 (D.C. Cir. 1981), *petition for cert. filed,* 50 U.S.L.W. 3840 (U.S. April 13, 1982) (No. 81-1891), which is currently before the United States Supreme Court. Claimant has filed a response opposing this motion. Having decided to reconsider our decision of April 28, 1982, when the Ninth Circuit renders its decision in *Freer,* we deny employer's motion to stay the remand of our earlier decision pending the Supreme Court's disposition in *Hilyer.* Our denial of employer's motion is without prejudice; accordingly, if necessary, employer can renew its motion after the Ninth Circuit renders its decision in *Freer.*

Lastly, claimant's attorney has filed an application for attorney's fee for work performed before the Board. An award of an attorney's fee is not payable until a final decision is issued. *See generally, Wells* v. *International Great Lakes Shipping Co.,* 14 BRBS 868 (1982). Since we have

granted reconsideration in the instant case, the application for an attorney's fee is premature. We will hold this application in abeyance until such time as a final order is issued in this case.

SO ORDERED.

Robert L. Ramsey, Chief
Administrative Appeals Judge

Julius Miller
Administrative Appeals Judge

Ismene M. Kalaris
Administrative Appeals Judge

Dated this 29th
day of July 1982